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NOTES

***WALLACE v. JAFFREE* AND THE NEED TO REFORM ESTABLISHMENT CLAUSE ANALYSIS**

The first amendment to the United States Constitution proclaims that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."¹ It is the first prohibition against government action in the Bill of Rights, the first "protected" right of the individual.² A popular metaphor used to express the intention of the framers of the amendment is that it was to erect a "wall of separation between church and State."³

However, as exemplified in the United States Supreme Court's recent decision in *Wallace v. Jaffree*,⁴ this boundary that government cannot cross is ambiguous and not amenable to precise definition.⁵ Few issues before the Court have been more controversial than those defining the boundary between permissible and impermissible "religious" government activity, particularly when public education is involved.⁶ In *Jaffree*, the Supreme Court

1. U.S. CONST. amend. I.

2. In *Everson v. Board of Educ.*, 330 U.S. 1 (1947), Justice Jackson claimed that the establishment clause was first in the Bill of Rights because it was first in the minds of our forefathers. *Id.* at 26 (Jackson, J., dissenting). The first amendment, however, was the 296th amendment to the Constitution proposed during the first session of Congress. For a chronological listing of the proposed amendments up to 1889, see H. AMES, PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES 1789-1889, at 306 (1897).

3. The metaphor was first used by Thomas Jefferson in an 1802 letter to members of the Danbury Baptist Association. It has been quoted many times by the Supreme Court. *E.g.*, *Reynolds v. United States*, 98 U.S. 145, 164 (1878); *Everson*, 330 U.S. at 16. It has not, however, always been quoted with approval. *See, e.g.*, *Wallace v. Jaffree*, 105 S. Ct. 2479, 2517 (1985) (Rehnquist, J., dissenting) (It is "a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned.").

4. 105 S. Ct. 2479 (1985).

5. "The fact is that the line which separates the secular from the sectarian in American life is elusive. The difficulty of defining the boundary with precision inheres in a paradox central to our scheme of liberty." *Abington School District v. Schempp*, 374 U.S. 203, 231 (1963) (Brennan, J., concurring).

6. "The Court's historic duty to expound the meaning of the Constitution has encountered few issues more intricate or more demanding than that of the relationship between religion and the public schools." *Id.* at 230 (Brennan, J., concurring). *See, e.g.*, Witt, *Court Ruling Spurs New School Prayer Drive*, 43 CONG. Q. 1111 (June 8, 1985); Wermiel, *Alabama*

held that the State of Alabama had violated this boundary when its legislature enacted a statute allowing a minute of silence for "meditation or voluntary prayer" at the beginning of each day in public schools.⁷

The petitioner in *Jaffree* sought a preliminary injunction against various prayer activities conducted in his children's public school classes and claimed that the Alabama statute allowing prayer and meditation was in violation of the establishment clause of the Constitution.⁸ Chief Judge Hand of the United States District Court for the Southern District of Alabama initially granted a preliminary injunction against the prayer activity. However, after a hearing on the merits, he dismissed the complaint, stating that "the establishment clause . . . does not prohibit the state from establishing a religion."⁹ The United States Court of Appeals for the Eleventh Circuit reversed, relying solely upon prior decisions of the Supreme Court.¹⁰

In a six to three decision, the Supreme Court affirmed.¹¹ Justice Stevens, writing for the majority, found that the Alabama statute violated the estab-

School Moment-of-Silence Law Is Struck Down, 6-3, by Supreme Court, Wall St. J., June 5, 1985, at 2, col. 3.

7. ALA. CODE § 16-1-20.1 (Supp. 1984) provides:

At the commencement of the first class of each day in all grades in all public schools, the teacher in charge of the room in which each such class is held may announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in.

See *Jaffree*, 105 S. Ct. at 2481 n.2. For a discussion of other states' voluntary prayer statutes, see *infra* note 93.

8. *Jaffree v. James*, 544 F. Supp. 727 (S.D. Ala. 1982). The plaintiff initially charged that three sections of the statute violated the establishment clause, ALA. CODE §§ 16-1-20, 16-1-20.1, and 16-1-20.2. Section 16-1-20 is identical to § 16-1-20.1, see *supra* note 7, except that it only allows "meditation," contains no mention of prayer, and pertains only to grades one through six. The district court did not find any infirmity with § 16-1-20 because, in its view, "there is nothing wrong with a little meditation and quietness." 544 F. Supp. at 732. The charge against § 16-1-20 was later dropped by the plaintiff. 105 S. Ct. at 2481 n.1. Section 16-1-20.2 authorized vocal prayer in public schools. The district court upheld this section, but this decision was reversed on appeal. *Jaffree v. Wallace*, 705 F.2d 1526, 1535 (11th Cir. 1983).

9. *Jaffree v. Board of School Comm'rs*, 554 F. Supp. 1104, 1128 (S.D. Ala. 1983). See *infra* note 11.

10. 705 F.2d at 1535. See *id.* at 1533-35. Between the time of the district court's decision and its reversal by the Eleventh Circuit, the plaintiff petitioned the appellate court for an emergency stay of the district court's decision. The circuit court denied the motion, whereupon the plaintiff made a request to Justice Powell, in his capacity as Eleventh Circuit Justice, to stay the trial court's order. In a memorandum opinion, Justice Powell granted the stay and reinstated the injunction pending final disposition in the circuit court. *Jaffree v. Board of School Comm'rs*, 459 U.S. 1314 (1983).

11. *Jaffree*, 105 S. Ct. at 2480. The Court found the decision of the district court to be "remarkable." *Id.* at 2486. See *Wallace v. Jaffree*, 466 U.S. 924 (1984) (order affirming parts of the decision, denying certiorari on the validity of § 16-1-20.2 and granting certiorari on the constitutionality of § 16-1-20.1).

lishment clause because its primary purpose was religious—to return voluntary prayer to public schools.¹² Justice O'Connor, in a separate concurrence, agreed with the majority's judgment¹³ but suggested certain revisions in the method of testing the constitutionality of such statutes or similar state actions.¹⁴ In a lengthy dissent, Justice Rehnquist relied on an historical analysis of the adoption of the establishment clause and concluded that its framers merely intended it to preclude government from establishing a national or state religion. He concluded that the statute in question did not represent the establishment of a state religion within the meaning of the clause and should not be struck down.¹⁵

This Note will analyze the Court's decisions prior to *Jaffree* on the issue of religion in public schools, focusing primarily on the emergence of the three-part test for determining the validity of state action against attack under the establishment clause.¹⁶ In addition, it will examine other approaches applied by the Court in establishment clause cases and how these approaches are reflected in the various opinions in *Jaffree*. The appropriateness of the test applied by the majority in *Jaffree* and its relevance to the establishment clause in particular will be evaluated. The Note will then recommend a reformation of the test to better reflect the underlying principles of the establishment clause and, specifically, to reflect the fear of state coercion of religious beliefs. It will conclude by demonstrating how a test that analyzes the coercive nature of a state's activity will assist the Court in its decisions in establishment clause cases, provide its decisions with a solid foundation based upon principles underlying the establishment clause, and add uniformity to the Court's methods of analysis.

I. ESTABLISHMENT CLAUSE ANALYSIS PRIOR TO *JAFFREE*

A. *The Emergence of the Lemon Test*

In attempting to maintain the wall of separation between church and state, the Court has struck down a variety of state and federal activities involving religion. However, mere government involvement in a religious ac-

12. 105 S. Ct. at 2490 & n.43 (statements by Alabama State Senator Donald Holmes relied upon by the Court to indicate the religious purpose of § 16-1-20.1) (Brennan, Marshall, & Blackmun, JJ., joined in the Court's opinion). 105 S. Ct. at 2480.

13. 105 S. Ct. at 2496. Justice Powell also filed a concurring opinion. *Id.* at 2493.

14. Changes are needed in the *Lemon* test "to make [it] more useful in achieving the underlying purpose of the First Amendment." *Id.* at 2497. *See id.* at 2496-99; *see also infra* notes 58-64 and accompanying text.

15. 105 S. Ct. at 2508-20. Justices Burger and White also filed dissenting opinions. *Id.* at 2505, 2508.

16. The full test was first announced in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). *See infra* notes 58-64 and accompanying text.

tivity does not necessarily render the activity unconstitutional. Indeed, the Court has upheld many such activities. This apparent inconsistency has led to confusion over the definition of the boundary separating permissible from impermissible activities.

In finding violations of the establishment clause, the Court has struck down, *inter alia*: state grants to sectarian schools and to parents who send their children to nonpublic schools;¹⁷ reimbursements to nonpublic schools for keeping various state-required records;¹⁸ state salary supplements to nonpublic school teachers;¹⁹ shared time programs that provide classes at public expense to nonpublic school students in classrooms located in and leased from nonpublic schools;²⁰ and the use of federal funds to pay public employees to teach in parochial schools.²¹

Not all activities involving church and state have been found to violate the establishment clause. For example, the Court upheld federal appropriations to a Roman Catholic hospital in the District of Columbia in 1899.²² Later, the Court sanctioned the use of federal funds for the education of Sioux Indians in Roman Catholic schools.²³ Other activities that have been upheld in subsequent decisions include: reimbursements to parents for busing their children to parochial schools;²⁴ state Sunday closing laws;²⁵ the lending of textbooks to children in nonpublic schools;²⁶ tax exemptions for personal and real property used for religious purposes;²⁷ the use of federal funds for the construction of buildings and facilities used exclusively for secular purposes at religious institutions of higher education;²⁸ the opening of each day of state legislatures with a prayer;²⁹ and the placement of a creche or other religious symbols on public grounds during the Christmas holiday season.³⁰

Cases involving religion in public schools have been a fairly recent phenomenon. Only six such cases were decided by the Court prior to *Jaffree*.³¹

17. Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973).

18. Levitt v. Committee for Pub. Educ., 413 U.S. 472 (1973).

19. *Lemon*, 403 U.S. at 602.

20. Grand Rapids School Distr. v. Ball, 105 S. Ct. 3216 (1985).

21. Aguilar v. Felton, 105 S. Ct. 3232 (1985).

22. Bradfield v. Roberts, 175 U.S. 291 (1899).

23. Quick Bear v. Leupp, 210 U.S. 50 (1908).

24. *Everson*, 330 U.S. at 1.

25. McGowan v. Maryland, 366 U.S. 420 (1961).

26. Board of Educ. v. Allen, 392 U.S. 236 (1968).

27. Walz v. Tax Comm'n, 397 U.S. 664 (1970).

28. Tilton v. Richardson, 403 U.S. 672 (1971).

29. Marsh v. Chambers, 463 U.S. 783 (1983).

30. Lynch v. Donnelly, 465 U.S. 668 (1984).

31. The six cases were: *Stone v. Graham*, 449 U.S. 39 (1980); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962); *Zorach v. Clauson*, 343 U.S. 306 (1952); *McCullum v. Board of Educ.*, 333 U.S. 203 (1948). See Wood,

In contrast to the Court's other decisions in establishment clause cases, those challenging religious activities in public schools have been relatively uniform in their outcomes. In all but one decision, the Court has found the activity in question unconstitutional.³²

The Court has continually expressed its aversion to state support for religious education. In the first case involving religion in public schools, *McCollum v. Board of Education*,³³ the Court declared unconstitutional a "released time" program offered by the Champaign, Illinois School District. Under the program, time was set aside each week for religious instructors to come into the public schools in order to conduct special religious classes. Although attendance by the students was completely voluntary and the religious instructors were privately employed, the Court found the program to be unconstitutional state aid to religious groups because it allowed religious groups to spread their faith through the use of the tax-supported school system.³⁴ It expressed dissatisfaction with the close cooperation between the state and religious organizations to effectuate the program and with the compulsory attendance laws that ensured religious groups had convenient access to students. Moreover, by releasing children from their legal duty to attend school upon the condition that they attend religious classes, the state was supporting and promoting religious activity. This program, proclaimed the Court, fell "squarely under the ban of the First Amendment."³⁵

The Court later limited the *McCollum* decision in *Zorach v. Clauson*³⁶ by upholding a "released time" program in the New York public schools. Unlike the *McCollum* program, the *Zorach* program allowed children to leave the public school grounds during certain hours to receive religious instruction at religious centers. Students were dismissed under this program only upon written permission of their parents. Those students who were not dismissed from school remained in secular classes.³⁷ In upholding the program, the Court distinguished it from the program struck down in *McCollum*³⁸ because the religious instruction was not conducted on the pub-

Religion and Education in American Church-State Relations, 26 J. CHURCH & STATE 31, 35-36 (1984). See generally Sky, *The Establishment Clause, the Congress and the Schools: An Historical Perspective*, 52 VA. L. REV. 1395, 1427-28 (1966).

32. *Zorach v. Clauson*, 343 U.S. 306 (1952). In *Zorach*, the Court upheld a program in which public school children were dismissed from regular classes to attend religious instruction off the school premises.

33. 333 U.S. 203 (1948).

34. *Id.* at 207-10.

35. *Id.* at 210.

36. 343 U.S. 306 (1952).

37. *Id.* at 308.

38. *McCollum*, 333 U.S. at 210.

lic grounds, all costs associated with the program were borne by the religious organizations, and there was no evidence of state influence or coercion. The Court noted that in establishment clause cases the problem of determining whether or not a practice is constitutional is one of degree.³⁹ Recognizing that we are a religious people and noting that religion historically has played a role in many aspects of government, the Court found it necessary to distinguish between mere accommodation by government of religious activities and active promotion of religion or of one religious sect over another.⁴⁰

Under the circumstances in *Zorach*, the Court determined that it "would have to press the concept of separation of Church and State to [the extreme] to condemn the present law on constitutional grounds."⁴¹ Here, the Court assured, the public schools were merely accommodating their schedules to allow students to receive outside religious instruction, a practice that is not condemned by either the history of the establishment clause or the traditional role religion has occupied with respect to government.⁴²

Viewing the activity in question in light of the history and original intent of the establishment clause and the traditional relationship between government and religion has been a useful tool of analysis for the Court. For example, no case involving religion in public schools has presented so clear a violation of the history and intent of the establishment clause as *Engel v. Vitale*,⁴³ in which the Court struck down a New York State practice of composing prayers and requiring their recitation in public classrooms.⁴⁴ The majority had no doubt that this was state-sponsored religious activity.⁴⁵ In reviewing the history of the establishment clause, the Court pointed out that the government practice of composing prayers and compelling citizens to recite them was one of the primary reasons many colonists left England to seek religious freedom in America.⁴⁶ As a result, the first amendment was added to the Constitution to guarantee that neither the power nor prestige of the federal government (or state governments through the fourteenth amendment) could be used to control, support or influence the citizens' reli-

39. *Zorach*, 343 U.S. at 308-09.

40. *Id.* at 313-14.

41. *Id.* at 313. *Cf.* Wood, *supra* note 31, at 37 ("[T]he Court [in *Zorach*] affirmed that the First Amendment means the separation of church and State, of which 'there cannot be the slightest doubt.'" (quoting *Zorach*, 343 U.S. at 314)).

42. *Zorach*, 343 U.S. at 315.

43. 370 U.S. 421 (1962).

44. *Id.* at 422. The "official" prayer stated: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." *Id.*

45. *Id.* at 424.

46. *Id.* at 425, 427. *See generally id.* at 424-35.

gious activities.⁴⁷ Therefore, state-composed school prayer fell squarely under the ban of the establishment clause.

The historical approach of analyzing establishment clause cases began to be displaced by a more concrete "test" in *Abington School District v. Schempp*.⁴⁸ *Schempp* involved a Pennsylvania statute that required that portions of the Bible be read aloud in public classrooms.⁴⁹ In examining the history of the establishment clause, as interpreted in prior cases, the Court held that the establishment clause required the states to maintain strict neutrality toward religion.⁵⁰ The Court found that in order to adhere to this command, the statute or state activity must have neither a purpose nor primary effect of advancing or inhibiting religion.⁵¹ If either occurs, the activity is in violation of the Constitution.⁵² The Court found that the purpose and effect of the Pennsylvania statute was to inject the state into the process of religious development of the individual, thereby breaching the required neutrality and violating the establishment clause.⁵³

The Court subsequently interpreted this "neutrality" to mean that a state cannot prohibit the teaching of certain theories or subjects because they are contrary to or not in accord with a particular religious dogma. In *Epperson v. Arkansas*,⁵⁴ the Court struck down a state statute prohibiting the teaching of the Darwinian theory of evolution in the public schools. Relying upon the test enunciated in *Schempp*,⁵⁵ the Court found that the clear purpose of the Arkansas statute was to prohibit the teaching of the Darwinian theory of evolution because it was contrary to the fundamentalist sectarians' conviction that the origin of man, as outlined in the Book of Genesis, is the exclu-

47. *Id.* at 429.

48. 374 U.S. 203 (1963).

49. "At least 10 verses of the Holy Bible shall be read without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading . . . upon the written request of his parent or guardian." PA. STAT. ANN. tit. 24, § 15-1516 (Purdon 1962), 1959 Pa. Laws 1928 (1960); *Schempp*, 374 U.S. at 205.

50. The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality.

Schempp, 374 U.S. at 226.

51. *Id.* at 222 (citing *McGowan*, 366 U.S. at 442; *Everson*, 330 U.S. 1 (1947)). The analysis used in *Schempp* is a precursor to the first and second prongs of the *Lemon* test. See *Lemon*, 403 U.S. at 612-13.

52. 374 U.S. at 225.

53. See *id.* at 223-24.

54. 393 U.S. 97 (1968).

55. *Id.* at 107 (quoting *Schempp*, 374 U.S. at 222).

sive theory of creationism.⁵⁶ Thus, the purpose of the statute was to protect and maintain the biblical approach to teaching in this area. According to the Court, "the state has no legitimate interest in protecting any or all religions from views distasteful to them."⁵⁷

The test used by the Court in *Schempp* and *Epperson* developed into its present form in *Lemon v. Kurtzman*,⁵⁸ which challenged state financial aid to religious schools rather than religious activities in public schools. At issue in *Lemon* was the constitutionality of state salary supplements to teachers in parochial schools in Rhode Island,⁵⁹ and a Pennsylvania program under which the state would purchase educational materials from nonpublic schools as well as reimburse parochial schools for salaries of those teaching secular subjects.⁶⁰ Chief Justice Burger, writing for the Court, described the three-part test to be used in analyzing these establishment clause questions. Under the test, the statute (or state activity) must have a secular legislative purpose, its principle or primary effect must be one that neither advances nor inhibits religion, and it must not foster an excessive government entanglement with religion.⁶¹ The Court, relying upon the premise that parochial schools are operated to indoctrinate students with particular religious tenets, found that it would be difficult for teachers in these schools to avoid such indoctrination even in classes involving secular subjects for which state funds were used. To ensure the religious neutrality of parochial schools, the state would be forced to monitor their classes constantly.⁶² In addition, the state would be required to audit school records to assure that the funds were used solely for secular purposes. For these reasons, the state would be involved in excessive and enduring government entanglement.⁶³ The pro-

56. *Epperson*, 393 U.S. at 107-08

57. *Id.* at 107 (quoting *Joseph Burstyn, Inc. v. Willson*, 343 U.S. 495, 505 (1952)). The statute in question stated: "It shall be unlawful for any teacher or other instructor in any . . . Public School . . . to teach the theory or doctrine that mankind ascended or descended from a lower order of animals" ARK. STAT. ANN. § 80-1627 (1960 Repl. Vol.). Violation of the statute was considered a misdemeanor. The violator could be fined up to \$500. *Id.* § 80-1628. The statute was a consequence of the famous "monkey trials." *Scopes v. State*, 154 Tenn. 105, 289 S.W. 363 (1927). The Arkansas statute was enacted one year later.

58. 403 U.S. 602 (1971).

59. *Id.* at 607-09.

60. *Id.* at 609-11.

61. *Id.* at 612-13.

62. *Id.* at 618-19.

63. *Id.* at 620. The Court reasoned that allowing such government entanglement in religion would lead to political division along religious lines. Although ordinarily political debate and division are normal and healthy in a democratic system of government, division along religious lines would lead to such conflict as to threaten our normal political process. This

grams were therefore held unconstitutional.⁶⁴

The *Lemon* test was first applied to cases involving religious activities in public schools in *Stone v. Graham*,⁶⁵ in which the Court found unconstitutional a Kentucky statute requiring the posting of the Ten Commandments in each public classroom. Although the state argued that posting the Commandments was strictly for its historical value,⁶⁶ the Court rejected this argument and found that the purpose of the action was plainly religious in nature, and was intended to instill the values of the Commandments in the students.⁶⁷ This was not a situation in which the Bible was used for a study of history, ethics, or comparative religion, which the Court stated would be constitutional.⁶⁸ Relying on the three-part test of *Lemon*,⁶⁹ the Court found that the statute did not have a secular purpose because of its religious intent and, therefore, was unconstitutional.⁷⁰

B. Historical and Original Intent Analysis

Although the Court normally has relied on the *Lemon* test to analyze establishment clause issues, in exceptional cases it has opted to return to the historical approach of its earlier decisions. Under this approach, the Court reviews the history surrounding the enactment of the establishment clause, the statements of its framers, and the tradition of the practice in question to

concern, stated the Court, "was one of the principal evils against which the First Amendment was intended to protect." *Id.* at 622. *See id.* at 622-24.

The Court's concern over divisiveness can be found in other cases involving the establishment clause. *See* *Walz v. Tax Comm'n*, 397 U.S. 664, 695 (Harlan, J., concurring); *Board of Educ. v. Allen*, 392 U.S. 236, 249 (1968) (Harlan, J., concurring); *Schempp*, 374 U.S. at 307 (Goldberg, J., concurring).

This concern can also be traced to the framers of the first amendment and their past experiences with government sponsored religion. *See* Kurland, *The Religion Clauses and the Burger Court*, 34 CATH. U.L. REV. 1, 2 (1984) (religious persecution of original settlers); Cahn, "The Establishment of Religion" Puzzle, 36 N.Y.U. L. REV. 1274, 1289 (1961). Indeed, James Madison, the original sponsor of the first amendment, warned that anything resembling an establishment of religion would sooner or later destroy the harmony the citizens of the new nation had endeavored to build, provoke bitter inter-group hostilities, weaken the general enforcement of the laws and "slacken the bands of society." J. MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS OF 1785. The full text of the *Memorial* can be found in Cahn, *supra* at 1293, app. B; Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1692 (1969). *See also* *Jaffree*, 105 S. Ct. at 2489 n.39.

64. 403 U.S. at 624-25.

65. 449 U.S. 39 (1980).

66. The state statute required that this explanation be placed in small print at the bottom of each poster. KY. REV. STAT. § 158.178 (1980).

67. 449 U.S. at 41.

68. *Id.* at 42 (citing *Schempp*, 374 U.S. at 225).

69. *Id.* at 40. *See Lemon*, 403 U.S. at 612-13; *see also supra* note 61 and accompanying text.

70. 449 U.S. at 42-43.

determine whether it is an activity against which the clause was intended to guard.

In *Marsh v. Chambers*,⁷¹ the Court applied this approach to uphold the practice of opening each day of the Nebraska state legislature with a prayer. Recognizing that this practice has been a common tradition in federal and state legislatures since the adoption of the Constitution, the Court found that it was clearly not the intent of the framers of the first amendment to preclude such practice.⁷² The Court noted that although historical patterns standing alone are not enough to justify contemporary practices involving religion, historical evidence should be used to shed light on the intent of the drafters of the establishment clause, particularly if the practice at issue was also practiced by them.⁷³ In the Court's view, the drafters' actions, as well as their statements, reveal their intentions.⁷⁴

The use of the historical approach, however, does not necessarily preclude the use of the *Lemon* test within the same case, as demonstrated in *Lynch v. Donnelly*.⁷⁵ In *Lynch*, the Court upheld the practice of displaying a creche on public grounds during the Christmas holiday season. In upholding this practice, the Court again relied on the events surrounding the passage of the establishment clause, statements made by its supporters and opponents, and the tradition of displaying the creche and allowing other religious activities involving government.⁷⁶ The Court went even further, however, and applied the three prongs of the *Lemon* test but found no violation of any part of the test. In viewing the displaying of the creche in the context of the Christmas holiday season, the Court found insufficient evidence that its purpose was to advocate a religious message. It determined that the purpose of the display was simple recognition of the holiday season. The Court also afforded little weight to the argument that the primary effect of the display was to advance religion because the display had no more effect of advancing religion than did other activities upheld by the Court, such as tax exemption for religious organizations.⁷⁷ Additionally, the Court found that because there was no contact between the government and religious groups, there was no entan-

71. 463 U.S. 783 (1983).

72. *Id.* at 786-91. See *Jaffree*, 105 S. Ct. at 2494 n.4.

73. *Marsh*, 463 U.S. at 790.

74. *Id.*

75. 465 U.S. 668 (1984).

76. *Id.* at 673-78.

77. *Id.* at 681-82. The Court also found that displaying the creche had no more effect of advancing religion than the use of public funds to transport children to sectarian schools, or grants for the construction of educational facilities at church-sponsored colleges or universities, all of which have been upheld by the Court. *Id.* at 682 (citing cases).

glement of the nature prohibited under the *Lemon* test.⁷⁸

II. THE *JAFFREE* DECISION

In *Jaffree*,⁷⁹ Justice Stevens, writing for the Court, invoked the purpose, effect, and entanglement test to strike down an Alabama statute allowing voluntary silent prayer in public schools. Citing several instances in which the sponsor of the statute stated (both prior to and after its enactment) that its purpose was to bring voluntary prayer back to the public schools, the Court held that the purely secular purpose prong of the test was "most plainly" violated.⁸⁰

The Court found additional evidence of the religious purpose of the statute by viewing its relationship with the other prayer statutes brought to issue originally in the case. The statute in question, the Court noted, was almost identical to the section preceding it, except that it allowed a moment of silence for "meditation or voluntary prayer" whereas the former allowed a moment of silence for "meditation" only.⁸¹ The Court stated that the existence of the statute was "for the sole purpose of expressing the State's endorsement of prayer activities" in public schools.⁸² Additionally, such endorsement was "not consistent with the established principle that the Government must pursue a course of complete neutrality toward religion."⁸³ Thus, failing the first prong of the *Lemon* test, the statute was rendered unconstitutional.⁸⁴ The Court, therefore, saw no need to apply the other two

78. *Id.* at 684-85. In *Larson v. Valente*, 456 U.S. 228 (1982), the Court failed to use the *Lemon* test in deciding the constitutionality of a Minnesota statute requiring charitable organizations, such as churches, to register with the state. The Court, relying upon history and past precedents, stated that when presented with a state law granting a denominational preference as opposed to state action supporting religion as a whole, it must use a strict scrutiny analysis in adjudging the constitutionality of the statute. *Larson*, 456 U.S. at 244-46.

79. The original complaint filed by petitioners challenged the practice of school teachers' reciting prayers before each class and before lunch. The teachers recited the Lord's Prayer at the beginning of class and a variety of prayers at lunch hour, e.g., "God is great, God is good, Let us thank Him for our food, Bow our heads we all are fed, Give us Lord our daily bread. Amen." *Jaffree v. Wallace*, 705 F.2d at 1528. The complaint was later amended to include the statutes. See *supra* notes 7-8. The Eleventh Circuit found that the vocal prayer activity violated the establishment clause because the conduct "did not appear to be secularly motivated." *Id.* at 1535. The Supreme Court denied certiorari to this part of the decision. *Wallace v. Jaffree*, 466 U.S. at 925.

80. *Jaffree*, 105 S. Ct. at 2490 & n.43. See *supra* note 12.

81. *Id.* at 2491. See *supra* note 8. For the full text of both sections, see *Jaffree*, 105 S. Ct. at 2481 nn.1-2.

82. *Jaffree*, 105 S. Ct. at 2492.

83. This idea of government neutrality, in the Court's view, was central to the notion of a wall of separation between church and state. See *id.* at 2492 & n.50 (citing cases).

84. *Id.* at 2493.

prongs of the test.⁸⁵

Justice O'Connor concurred with the majority that the statute indeed violated the establishment clause,⁸⁶ but wrote separately to explain why moment-of-silence statutes in other states might not face the same infirmity.⁸⁷ She also sought to share her reservations about the *Lemon* test and its use in establishment clause cases. In her view, the principle reason why the statute was unconstitutional was because its sponsors clearly created and enacted it for the sole purpose of returning prayer to public schools.⁸⁸ Although not entirely abandoning the use of the *Lemon* test, she argued that the test was in need of reconsideration and refinement by the Court "to make [it] more useful in achieving the underlying purpose of the First Amendment."⁸⁹

To achieve this, Justice O'Connor argued that the Court should examine closely whether the government's purpose in enacting the statute was to "endorse" religion and whether the statute actually conveyed a message of endorsement.⁹⁰ She recognized that it is impossible to separate church and state completely because both must function in the same community, and their activities will inevitably intertwine.⁹¹ The "endorsement test," she argued, "does not preclude government from acknowledging religion or from taking religion into account in making law and policy," but simply prohibits it from "conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred."⁹²

Pointing out that twenty-five states currently have moment-of-silence statutes,⁹³ Justice O'Connor reasoned that under her analysis even those statutes

85. As the Court stated, "no consideration of the second or third criteria is necessary if a statute does not have a clearly secular purpose." *Id.* at 2490.

86. *Id.* at 2496 (O'Connor, J., concurring).

87. *Id.* (O'Connor, J., concurring).

88. *Id.*

89. *Id.* at 2497.

90. *Id.*

91. *Id.*

92. *Id.* The test also includes whether the statute is intended to discourage religion generally or only a particular sect. *See id.* at 2499 (citing *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring)).

93. In addition to the Alabama statute, see ARIZ. REV. STAT. ANN. § 15-522 (1984); ARK. STAT. ANN. § 80-1607.1 (1980); CONN. GEN. STAT. § 10-16a (1983); DEL. CODE ANN., tit. 14, § 4101 (1981); FLA. STAT. § 233.062 (1983); GA. CODE ANN. § 20-2-1050 (1982); ILL. REV. STAT., ch. 122, § 771 (1983); IND. CODE § 20-10.1-7-11 (1982); KAN. STAT. ANN. § 72.5308a (1980); LA. REV. STAT. ANN. § 17:2115(A) (West 1982); ME. REV. STAT. ANN., tit. 20-A, § 4805 (1983); MD. EDUC. CODE ANN. § 7-104 (1985); MASS. GEN. LAWS ANN., ch. 71 § 1A (1982); MICH. COMP. LAWS ANN. § 380.1565 (West 1984-1985); N.J. STAT. ANN. § 18A: 36-4 (West Supp. 1984-1985); N.M. STAT. ANN. § 22-5-4.1 (1981); N.Y. EDUC. LAW § 3029-a (McKinney 1981); N.D. CENT. CODE § 15-47-30.1 (1981); OHIO REV. CODE ANN. § 3313.60.1 (1980); PA. STAT. ANN., tit. 24, § 15-1516.1 (Purdon Supp. 1984-1985); R.I. GEN.

that acknowledge a moment of silence may be used for prayer could pass constitutional muster, provided they also allow meditation or reflection on the day's activities.⁹⁴ In her view, providing a moment of silence does not necessarily denote that the state is endorsing prayer, whether it be prayer or merely meditation, because the child is free to have his own thoughts.⁹⁵ However, if it is clear from the face of the statute or its legislative history that its purpose is to encourage prayer over other activities, such as simple quiet time, then it is constitutionally flawed.⁹⁶ "The crucial question is whether the State has conveyed or attempted to convey the message that children *should* use the moment of silence for prayer."⁹⁷ Justice O'Connor added that in viewing the intent underlying any statute, a court should defer to the legislature that approved it.⁹⁸

Notwithstanding such deference, the Alabama statute in question failed Justice O'Connor's test. In reviewing the text in light of its official legislative history, Justice O'Connor had little doubt that its sole purpose was to return

LAWS § 16-12-3.1 (1981); TENN. CODE ANN. § 49-6-1004 (1983); VA. CODE § 22.1-203 (1980); W. VA. CONST., Art. III, § 15-a.

The typical state statute calls for a moment of silence in the classroom for either meditation or voluntary prayer, as in the case of Alabama Statute § 16-1-20.1. A few are similar to Alabama Statute § 16-1-20 allowing a moment of silence for meditation only. See *Jaffree*, 105 S. Ct. at 2498. For a useful chart comparing the various statutes, see Note, *Daily Moments of Silence in Public Schools: A Constitutional Analysis*, 58 N.Y.U. L. REV. 364, 407-08 (1983). See also Note, *The Unconstitutionality of State Statutes Authorizing Moments of Silence in the Public Schools*, 96 HARV. L. REV. 1874, 1874 n.1 (1983). Federal courts are divided on the constitutionality of these statutes. Compare *Gaines v. Anderson*, 421 F. Supp. 337 (D. Mass. 1976) (upholding statute) with *May v. Cooperman*, 572 F. Supp. 1561 (N.D.N.J. 1983) (striking down statute); and *Duffy v. Las Cruces Pub. Schools*, 557 F. Supp. 1013 (D.N.M. 1983) (striking down statute).

94. "A moment of silence law that is clearly drafted and implemented so as to permit prayer, meditation, and reflection within the prescribed period, without endorsing one alternative over the others, should pass [the] test [of constitutionality]." *Jaffree*, 105 S. Ct. at 2501 (O'Connor, J., concurring). See *id.* at 2505 (O'Connor J., concurring). Justice Powell agreed that a statute simply allowing a moment of silence for meditation would be constitutional. *Id.* at 2495 (Powell, J., concurring).

95. See *Jaffree*, 105 S. Ct. at 2498-99 (O'Connor, J., concurring). The Court in *Jaffree* did not address the question of *how* a child could pray during the moment of silence.

96. See *id.* at 2499 (O'Connor, J., concurring).

97. *Id.* (emphasis added) (O'Connor, J., concurring).

When the State provides a moment of silence during which prayer may occur at the election of the student, it can be said to be adjusting the schedule of public events to sectarian needs. But when the State also encourages the student to pray during a moment of silence, it converts an otherwise inoffensive moment of silence into an effort by the majority to use the machinery of the State to encourage the minority to participate in a religious exercise.

Id. at 2499 n.2 (O'Connor, J., concurring).

98. "If a legislature expresses a plausible secular purpose for a moment of silence statute . . . then courts should generally defer to that stated intent." *Id.* at 2500; see *id.* at 2499-500.

voluntary prayer to the schools. Therefore, the state was unconstitutionally endorsing and encouraging religious activity.⁹⁹

Justice Rehnquist, the principal dissenter,¹⁰⁰ put forth a protracted exposé of the history of the establishment clause and the intent of its drafters. Through the use of historical accounts, he maintained that the establishment clause was not intended to preclude states from allowing prayer in public schools. Rather, the clause merely prohibited the national government and state governments (through the fourteenth amendment) from establishing a national or state church or from discriminating between religious sects.¹⁰¹ Justice Rehnquist referred to several instances in which early presidents and other national leaders expressed support for religious activities and even sponsored such activities through the use of government funds.¹⁰² He also cited excerpts from congressional debates prior to passage of the establishment clause illustrating that members of Congress, as well as James Madison, the original sponsor of the amendment, were primarily concerned about the establishment of a national religion.¹⁰³

This evidence, reasoned Justice Rehnquist, led to the conclusion that the underlying intent of the clause was *not* to require the government to act with complete neutrality toward religion or erect an "impregnable wall" of separation between church and state as the majority has maintained.¹⁰⁴ Simply, the clause required that government not favor one religion over another in its actions. He argued that the three-part test of *Lemon*, which in his view adds "mortar to the wall," suffers the same historical deficiencies as the wall concept because it is in no way based on either the language or intent of the

99. *Id.* at 2501-02 (O'Connor, J., concurring).

100. Chief Justice Burger expressed the view that the majority's decision placed the Court in the position of acting hostile toward religion. He also found no threat to religious liberty due to the statute. 105 S. Ct. at 2505 (Burger, C.J., dissenting). Justice White expressed his agreement with the views of the Chief Justice. *Id.* at 2508 (White, J., dissenting).

101. *Id.* at 2520 (Rehnquist, J., dissenting).

102. *See id.* at 2514 (Rehnquist, J., dissenting). George Washington, John Adams and James Madison all issued Thanksgiving proclamations. The proclamation signed by George Washington contained the passage: "that we may . . . unite in most humbly offering our prayers and supplications to the great Lord and Ruler of Nations . . ." 1 J. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1902, at 64 (1897); 105 S. Ct. at 2514 (Rehnquist, J., dissenting). Thomas Jefferson refused to make a proclamation, believing that the designation of such a day was better left in the hands of the various religious societies. *Id.* (Rehnquist, J., dissenting). *See* 11 WRITINGS OF THOMAS JEFFERSON 429 (A. Lipscomb ed. 1904). Jefferson did, however, sign a treaty with the Kaskaskia Indians under which federal funds were used to support the tribe's Roman Catholic priest and church. Treaty with Kaskaskias, 7 Stat. 78 (Aug. 13, 1803).

103. 105 S. Ct. at 2509-13 (Rehnquist, J., dissenting).

104. "There is simply no historical foundation for the proposition that the Framers intended to build the 'wall of separation' . . ." 105 S. Ct. at 2516 (Rehnquist, J., dissenting).

drafters of the establishment clause.¹⁰⁵ Justice Rehnquist concluded, therefore, that nothing in the first amendment prohibits the states from generally encouraging prayer in public schools, as the Alabama statute had done.¹⁰⁶

III. DICHOTOMY OF ANALYSIS

A. Problems with Lemon

Wallace v. Jaffree reflects the divergence of opinion within the Court as to the proper form of analysis to be applied in establishment clause cases. In finding the statute unconstitutional, the majority depended on the *Lemon* test, which has become the standard approach in establishment clause cases.¹⁰⁷ The dissenting opinion of Justice Rehnquist reflects the historical or original intent approach to analyzing such cases, a method also used by the Court in the past.¹⁰⁸ The concurrence by Justice O'Connor demonstrates that these two approaches are not necessarily contradictory in nature and perhaps can be reconciled, but only by modifying the *Lemon* test to reflect more accurately the intent of the framers of the establishment clause.¹⁰⁹ In essence, to commingle the two approaches would give the decisions of the Court a more solid foundation in the history and intent of the Constitution.

Part of the criticism of the *Lemon* test stems from the difficulty in defining its basis or foundation. As Justice O'Connor stated, "[i]t has never been

105. *Id.* at 2517-18 (Rehnquist, J., dissenting).

106. *Id.* at 2520 (Rehnquist, J., dissenting).

107. See, e.g., *Americans United for Separation of Church and State v. Grand Rapids School Dist.*, 718 F.2d 1389, 1397-98 (6th Cir. 1983), *aff'd sub nom.* *Grand Rapids School Dist. v. Ball*, 105 S. Ct. 3216 (1985); *Members of Jamestown School Comm. v. Schmidt*, 427 F. Supp. 1338, 1346-47 (D.R.I. 1977). The Court has continually reaffirmed its adherence to the test. See, e.g., *Jaffree*, 105 S. Ct. at 2494 ("Only once since our decision in *Lemon* . . . have we addressed an establishment clause issue without resort to its three-prong test.") (Powell, J., concurring); *Ball*, 105 S. Ct. at 3223 ("We . . . reaffirm that State action alleged to violate the Establishment Clause should be measured against the *Lemon* criteria."); *Lynch v. Donnelly*, 465 U.S. at 696 n.2 ("[E]ver since its initial formulation, the *Lemon* test has been consistently looked upon as the fundamental tool of Establishment Clause analysis.") (Brennan, J., dissenting). The test has also been criticized many times by members of the Court. See *Aguilar*, 105 S. Ct. at 3242-43 (Burger, C.J. & Rehnquist, J., dissenting); *Jaffree*, 105 S. Ct. at 2507 (Burger, C.J., dissenting) ("The Court's extended treatment of the 'test' of *Lemon v. Kurtzman* suggests a naive preoccupation with an easy, bright-line approach for addressing constitutional issues.") (citations omitted); *id.* at 2496 ("the *Lemon* test has proven problematic.") (O'Connor, J., concurring).

108. See *supra* notes 71-78 and accompanying text.

109. *Jaffree*, 105 S. Ct. at 2497 (O'Connor, J., concurring) ("Our goal should be 'to frame a principle . . . that is . . . grounded in the history and language of the first amendment . . .'" (quoting Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 329, 332-33 (1963))).

entirely clear . . . how the three parts of the test relate to the principles enshrined in the Establishment Clause."¹¹⁰ By not being based on the intent and history of the clause, the test is subject to arbitrary application and yields inconsistent and unprincipled results.¹¹¹ More importantly, such a broad test diffuses the meaning of the Constitution and displaces the intent of the original drafters of the establishment clause with that of the members of the Supreme Court.¹¹²

A purely historical approach, such as Justice Rehnquist's, however, is equally flawed. Specific activities that confront the Court today, such as those involving the public school system, cannot always be traced back to the days of the enactment of the establishment clause.¹¹³ Thus, it is virtually impossible to determine whether the framers intended the establishment clause to preclude certain activities. The goal of the Court, therefore, should be to identify the *basic* concerns of the drafters of the establishment clause and to frame a test that reflects those concerns. Such a test should also be capable of consistent application to the relevant establishment clause problems.¹¹⁴

B. Basis of the Establishment Clause—Coercion

Perhaps the most significant concern to the drafters of the establishment clause was the fear of government coercion or attempts to influence the religious beliefs of individuals.¹¹⁵ Although this same concern over coercion can be distilled from many of the Court's decisions involving modern estab-

110. *Lynch*, 465 U.S. at 688-89 (O'Connor, J., concurring).

111. *See Jaffree*, 105 S. Ct. at 2519 (Rehnquist, J., dissenting).

112. There has been renewed debate among justices and scholars over the proper method of interpreting the Constitution. Central to the controversy is whether it is being interpreted in such a way merely to support a particular ideology or to reflect the original intent of its framers. *See, e.g., Meese Hits Judicial Activism: Constitution is Turned Into a "Chameleon,"* Wash. Post, Nov. 16, 1985, at A2, col. 4.

113. Our system of public education did not take root until approximately 1820. *See* 1 C. BEARD, *THE RISE OF AMERICAN CIVILIZATION* 810-18 (1937).

114. *See* Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 329, 332-33 (1963); *Jaffree*, 105 S. Ct. at 2497 (O'Connor, J., concurring).

115. This freedom against government coercion of religious beliefs is part of the "individual's freedom of conscience," the central liberty that the Court has said "unifies the various clauses in the First Amendment." *Jaffree*, 105 S. Ct. at 2487. Elsewhere, the Court has observed:

The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by [government action] of the acceptance of any creed or the practice of any form of religious worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion.

Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

lishment clause cases, the test used by the majority in *Lemon* fails to reflect it.

Coercion of religious beliefs by the state was a principle reason why many colonists left England and other countries to settle in America where they could practice their religion freely and openly.¹¹⁶ The practice of state-established religion, however, was not foreign to America. Indeed, many colonies had established "official" religions.¹¹⁷ Both James Madison and Thomas Jefferson recognized the destructive nature of allowing state-established religion and the need to secure religious freedom. Their concerns eventually led to the passage of the Bill to Establish Religious Freedom in the Virginia Legislature, and, three years later, the first amendment to the Constitution in the U.S. Congress.¹¹⁸ For Madison and Jefferson, religious freedom was the crux of the struggle for freedom in general.¹¹⁹

As the Court pointed out in *Jaffree*, freedom of religion meant the freedom to *choose* what religion one will practice, the freedom to choose *not* to practice any religion, as well as the freedom to *practice* one's chosen religion without government coercion or interference.¹²⁰ The freedom to choose and the freedom to practice were central to the notion of religious liberty encompassed in the religion clauses of the first amendment.¹²¹ The framers of the first amendment recognized, as did the majority in *Jaffree*, that true religious convictions cannot be instilled in a person through the heavy hand of government. As the majority in *Jaffree* declared, those "religious beliefs [that are] worthy of respect are [those that are] the product of free and voluntary

116. See *supra* note 46 and accompanying text; see also Kurland, *supra* note 63, at 2 ("It cannot be forgotten that a very large number of our original settlers . . . were here to escape the religious intolerance of their native lands, whether Calvinists or Catholics, Baptists or Methodists, or the multitudes of smaller religious groups whose religious beliefs subjected them to persecution."); Cahn, *supra* note 63, at 1289.

117. *Engel*, 370 U.S. at 427 & n.9. See Kurland, *supra* note 63, at 2.

118. *Everson*, 330 U.S. at 39 (Rutledge, J., dissenting). See generally *id.* at 33-39 (Rutledge, J., dissenting); B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 265 (1967); S. COBB, *THE RISE OF RELIGIOUS LIBERTY IN AMERICA: A HISTORY* 67-453 (1902); L. PFEFFER, *CHURCH, STATE, AND FREEDOM* 71-90 (rev. ed. 1967).

119. 330 U.S. at 34 (Rutledge, J., dissenting).

120. 105 S. Ct. at 2488 ("[T]he individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all."). There is significant dispute as to whether the first amendment protects against government interference with the individual's freedom not to choose any religion at all or whether it merely prohibits the government from supporting one religion or religious sect over another. According to Justice Rehnquist, the first "Congress did not mean that Government should be neutral between religion and irreligion." *Id.* at 2513 (Rehnquist, J., dissenting). See 2 J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1874, at 593-94 (1891); *THE COMPLETE MADISON* 299-301 (S. Padover ed. 1953).

121. *Cantwell*, 310 U.S. at 303-04.

choice by the faithful"¹²²

The concern over coercion or influence of the individuals' religious beliefs by government has consistently played a major role in past Court decisions involving religion in public schools.¹²³ Even in *Zorach v. Clauson*, the only case in which the religious activity was upheld, the Court declared that if the state was indeed being used to persuade or coerce students to take religious instruction, "a wholly different case would be presented."¹²⁴

This concern about coercion is also evident in the "endorsement" concept that Justice O'Connor discussed in her *Jaffree* concurrence. In speaking of government endorsement of religion, she recognized that the power and prestige of the state, through its financial resources and influence, can be a powerful force behind a religion or religious belief and can have an enormous coercive effect on the individual. Such an endorsement, in her view, constitutes state influence and thus infringes upon the religious liberty of the individual.¹²⁵ The threat of coercion is particularly acute in cases involving children, who tend to be more "susceptible to pressure to conform and to participate in the expression of religious beliefs that carry the sanction and compulsion of the State's authority."¹²⁶ Justice O'Connor recognized the delicate nature of children and the potentially coercive power of the state in the formulation of their religious beliefs.¹²⁷

C. Bridging the Gap Between Abstract and Historical Analysis

The question of the proper role of religion in our society has been a con-

122. 105 S. Ct. at 2488.

123. *McCullum*, 333 U.S. at 217 ("The preservation . . . of religion from censorship and coercion however subtly exercised, requires strict confinement of the State to instruction [in public schools] other than religious, leaving to the individual's church and home, indoctrination in the faith of his choice.") (opinion of Frankfurter, J.); *Engel*, 370 U.S. at 429 ("The First Amendment was added to our Constitution to stand as a guarantee that neither the power nor the prestige of the Federal [or State] Government[s] would be used to control, support or influence the kinds of prayer the American people can say"); *Epperson*, 393 U.S. at 104-05; *Stone*, 449 U.S. at 42 ("If the [posting of the] Ten Commandments are to have any effect at all, it will be to induce the school children to . . . obey [them]."). For a useful analysis of a constitutional standard with coercion as its basis, see Choper, *supra* note 114, at 343-50.

124. *Zorach*, 343 U.S. 306, 311 (1952).

125. *Jaffree*, 105 S. Ct. at 2497 (O'Connor, J., concurring) (quoting *Engel*, 370 U.S. at 431).

126. Kauper, *Prayer, Public Schools and the Supreme Court*, 61 MICH. L. REV. 1031, 1046 (1963). See Choper, *supra* note 114, at 370-71.

127. *Jaffree*, 105 S. Ct. at 2503 (O'Connor, J., concurring). See, e.g., *Engel*, 370 U.S. at 431; *Jaffree*, 105 S. Ct. at 2498 (O'Connor, J., concurring); Kauper, *supra* note 126, at 1046 ("[I]mmature and impressionable children are susceptible to a pressure to conform and to participate in the expression of religious beliefs that carry the sanction and compulsion of the State's authority.").

troversial issue since our country's inception. Central to this controversy is the issue of prayer in public schools, be it vocal or silent.¹²⁸ In *Jaffree*, the Court focused on the secular purpose prong of the *Lemon* test to strike down a statute allowing a moment of silence in public school classes.¹²⁹ The rationale of the decision exemplifies how the use of the *Lemon* test can add confusion to the Court's rulings. The confusion is particularly evident in view of other recent Court decisions. In *Marsh v. Chambers*, for example, the purpose of opening each legislative day with a prayer was plainly not secular, yet it was upheld by the Court.¹³⁰ The same is true of *Lynch v. Donnelly*,¹³¹ in which the Court upheld the displaying of a creche on public grounds during the holiday season.

For the decisions of the Court to merit public confidence and respect, they must be consistent and clearly express the principles espoused in the Constitution. The purpose, effect, and entanglement test of *Lemon*, although a convenience to the Court, is too abstract to achieve this goal.¹³² A more meaningful inquiry in establishment clause cases would be to question whether the challenged practice threatens those consequences that the framers deeply feared.¹³³

The fear of coercion of religious beliefs by government action was central to the framers of the first amendment and was a primary impetus for its passage.¹³⁴ The Court should therefore change its inquiry to reflect this fear. By focusing its analysis on whether the government's action has the direct or indirect effect of influencing or coercing an individual's religious beliefs, the Court would be achieving several important goals. First, it would be establishing a standard based on the history and intent of the first amendment, thus providing a firm historical foundation for the Court's decisions and those of lower courts. Second, it would provide more consistency in its decisions and sufficient flexibility to resolve the different types of issues that may arise in establishment clause cases.

The use of this analysis would also reconcile the Court's decisions in *Marsh*¹³⁵ and *Lynch*¹³⁶ with *Jaffree*.¹³⁷ In both *Marsh* and *Lynch*, there was

128. See, e.g., Witt, *supra* note 6; Ferrara, *Reading Between the Lines of the School-Prayer Decision*, Wall St. J., June 11, 1985, at 30, col. 2.

129. *Jaffree*, 105 S. Ct. at 2489-90.

130. *Marsh*, 463 U.S. 783 (1983).

131. *Lynch*, 465 U.S. at 668.

132. The test is used freely on a wide variety of activities. See, e.g., *Nyquist*, 413 U.S. at 756 (state financial aid to parochial schools); *Harris v. McRae*, 448 U.S. 297 (1980) (allegation that denial of federal funds for abortions promoted the tenets of the Roman Catholic Church).

133. See *Schempp*, 374 U.S. at 236 (Brennan, J., concurring).

134. Cahn, *supra* note 63, at 1289; see *supra* note 116.

135. *Marsh*, 463 U.S. at 783.

no discernible coercive effect as a result of the religious activity. In *Marsh*, the audience consisted of adults, who are less prone to pressure from their peers or the state and are more capable of formulating their own religious beliefs without being influenced by the prayer activity.¹³⁸ In *Lynch*, the practice of placing a creche on public grounds existed for many years with no evidence indicating that it influenced or coerced anyone's religious beliefs.¹³⁹ Finally, by focusing on the coercive effect of a particular activity, courts would not be obligated to determine the intent of state legislators in passing various acts as required in the *Lemon* test. This "intent" can be manipulated by legislatures, and in many states, legislative intent is simply not recorded.¹⁴⁰

IV. CONCLUSION

In *Wallace v. Jaffree*, the Court applied an abstract test to strike down a state statute providing for a moment of silence in public schools. Prior to the development of the three-part *Lemon* test, the Court concentrated on the principles underlying the establishment clause, especially the fear of government coercion. Since *Lemon*, however, it has opted to use "an easy bright-line approach" for addressing complex establishment clause cases.¹⁴¹ It is difficult to understand how some of the infirmities found by the Court in *Jaffree* through the use of the test are those against which the establishment clause was intended to guard. Although the outcome of the *Jaffree* decision may have been the same using the coercion analysis, the decision of the Court would have been more soundly based on the principles of the establishment clause if the coercion analysis had been applied. The Court must reform its approach in establishment clause cases to reflect more accurately the principles espoused in the first amendment. By focusing on the coercive

136. *Lynch*, 465 U.S. at 668.

137. Fear of coercion may also explain the different outcomes in *Widmar v. Vincent*, 454 U.S. 263 (1981), in which the Court upheld student prayer group meetings at public colleges and universities and *Bender v. Williamsport School Dist.* 741 F.2d 538, 559-60 (3d Cir. 1984) (en banc), vacated on grounds of standing, 54 U.S.L.W. 4307 (U.S. March 25, 1986), in which the Third Circuit found unconstitutional the same practice in public high schools.

138. *Marsh*, 463 U.S. at 792.

139. *Lynch*, 465 U.S. at 683. The coercion analysis would also reconcile the outcomes of *Lynch* and *Schempp*. See *supra* notes 48-53 and accompanying text. The practice in *Schempp* of Bible reading clearly had the potential of influencing children's religious beliefs. Both practices were religious in nature, yet the Court in *Lynch* found that the purpose behind displaying the creche was not religious. It would be better if the Court would look at the coercive nature of the activity in question.

140. Legislative history is not recorded in Arizona, New Jersey, or New Mexico. See Note, *The Unconstitutionality of State Statutes*, *supra* note 93, at 1879 & n.35.

141. *Jaffree*, 105 S. Ct. at 2507 (Burger, C.J., dissenting).

nature of the activity or statute upon an individual's religious beliefs, the Supreme Court would achieve this important goal.

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